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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

JOSHUA CONEY RHEA,

Defendant and Appellant.

C085305

(Super. Ct. No. 17FE005909)

Defendant Joshua Coney Rhea appeals a judgment entered after a jury found him guilty of being a felon in possession of a firearm (Pen. Code, § 29800, subd. (a)(1); count one),<sup>1</sup> but found him not guilty of possessing a short-barreled rifle (§ 33215; count two). Defendant was found to have also violated his probation by virtue of these findings<sup>2</sup> and was further determined to have suffered two prior prison convictions, one of which was a

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

<sup>2</sup> Defendant was on felony probation in Sacramento County case No. 15F01211.

serious felony strike prior. He was sentenced to an aggregate prison term of 11 years four months.

Defendant's challenge on appeal is limited to the instructions pertaining to his firearm conviction. He argues the trial court prejudicially erred in refusing to give his requested pinpoint instructions supporting the defense that he lacked the wrongful intent to possess his friend's rifle, despite his access and proximity to the weapon.

We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

The only witness in this case, Sacramento Deputy Probation Officer Dondi Decena, testified he went to defendant's address to meet with him, conduct a compliance check, and ask him about the whereabouts of another probationer. Defendant's grandmother answered the door and let him in. Officer Decena saw defendant walking down the hallway and asked him to take a seat in the living room. Defendant told him there were two other people at the house, his girlfriend and his friend, who were both in his room. Officer Decena walked down the hall to defendant's open door and asked these individuals to join them in the living room.

Officer Decena then asked defendant, "Hey, is there anything illegal in your room? Because I'm going to search it really quick." Defendant initially said no, except possibly "a little bit of marijuana." However, shortly thereafter, defendant said that "he needed to be handcuffed." Officer Decena was shocked, but nonetheless began the process of handcuffing him. During this process, Decena asked him what was in the room that required handcuffing, and defendant answered softly, stating, "There's a rifle in my room." Officer Decena proceeded to defendant's room and located the loaded .22-caliber rifle inside a plastic yellow bag that was inside an unzipped green duffle bag with

just the wooden butt visible. This bag was near the door in a position requiring Decena to step around it to enter the room.

On cross-examination, Officer Decena conceded that he did not know how long defendant or his girlfriend (who appeared to be living there) had been at the house that particular day. However, defendant's friend had been there a little over an hour and had originally been seated near the bag where the gun was found. Defendant did not tell Officer Decena that it was his rifle, only that it was in his room. The only bullets located were within the rifle, and Decena did not find a gun case or gun cleaning supplies. However, on redirect, Officer Decena testified that it was not unusual for a probationer with a gun to not have a case, a cleaning kit, or spare ammunition.

The parties stipulated that defendant "has previously been convicted of a felony."

Given that stipulation and because defendant told Officer Decena about the rifle, the People's closing argument focused on whether defendant actually possessed it. The prosecutor explained that possession in this context had a special meaning. More than one person could possess something, and it was not necessary to "actually hold or touch something to possess it." Rather, "[i]t is enough that the person has control over it or the right to control it, either personally or through another person." He clarified further, possession is not ownership and should not be confused with it. For example, the TV remote in the prosecutor's house, which may be used by anyone in his living room, is possessed by multiple people. Further, the prosecutor did not own the clicker being used in the presentation to the jury, but he did have control over it and possess it within the meaning of the law. The defense attorney would soon use the same clicker, as could the judge, because they all had the right to control it, and thus, all possessed it.

Similarly, the People argued defendant had possession because he knew of the rifle in his bedroom as shown through him telling the probation officer about it and asking to be handcuffed, which showed consciousness of guilt. The rifle was sticking out

of an open bag that was partially obstructing the entrance to that bedroom and was accessible to all people in the room. Whether the others might have brought the rifle to the room did not matter. The rifle was there and available for defendant to pick up, “should he have had the desire.”

In contrast, the defense challenged the People’s characterization of the law of possession. The defense attorney argued that the People’s evidence showed knowledge of the rifle, but not possession of it, which were separate elements. He continued, “[p]roximity, ability, [and] access” were not enough to establish constructive possession; the People also had to show “control or [the] right to control.” As to that right, he noted, the gun was discovered in a bag next to where defendant’s friend sat, and in that position, only that friend had access to it. The People had not established when defendant learned of the gun, which the defense argued was not obvious as it was positioned in the bag. Further, defendant’s statement asking to be handcuffed showed prudence, not consciousness of guilt, and his statement that there was a gun did not show when he obtained that knowledge or establish his right to control the gun. Defendant could not be convicted based upon his out-of-court statement alone.

While conceding it was not required, the defense argued, the evidence did not establish that defendant exclusively controlled the gun, as it was not found “under his bed or in his closet.” There was no evidence linking the gun to the defendant; no evidence it had been recently used or was about to be used, neither were there fingerprints nor DNA. The defense posited defendant would not take out a gun, wrapped in a bag, and leave it next to a guest, nor would he search a guest in his home. Defense counsel continued arguing there was no evidence defendant could or did “exercise dominion and control” over the gun, and the possibility that he could have was not proof beyond a reasonable doubt. That the gun was in defendant’s bedroom did not show he had the right to control it because he was not responsible for items brought by his guests. The evidence

suggested it was defendant's friend's gun, and there was no evidence that defendant could boss around that friend or control the gun through his friend. For these reasons, the People had not proven beyond a reasonable doubt that defendant possessed the gun.

The defense further reminded the jury that the judge instructs on the law, and that the jury is empowered to ask questions about those instructions, if needed. It also urged the jury not to split its verdict; either defendant possessed the gun and was guilty of both counts or he did not.

In rebuttal, the People reiterated that ownership of the gun was not required, and ownership is different from possession and knowledge. The People further argued that a felon living with his wife, who has a gun in a locked safe that he does not have the combination to does not possess the firearm, even though he knows it is in his house because he lacks access. Similarly, a felon working for a delivery company who delivers a box that turns out to have a gun in it did not unlawfully possess the gun while delivering it because he did not have knowledge. In contrast, here, defendant knew the gun was in his room, he had access to it, and he was a felon. The defense's other inquiries did not undermine the People's showing on the required elements. Further, the defense was incorrect when it suggested that an individual would not possess toys brought by their children into their house when they were owned by others.

The jury later asked for a "legal definition of control," but before a response was finalized, the jury announced it had reached a verdict. It found defendant guilty of count one, but not guilty of count two.

## **DISCUSSION**

### **1.0 The Trial Court Properly Instructed the Jury**

As explained in *People v. Burney* (2009) 47 Cal.4th 203, 246 (*Burney*): "A trial court must instruct the jury, even without a request, on all general principles of law that

are ‘ “closely and openly connected to the facts and that are necessary for the jury’s understanding of the case.” [Citation.] In addition, “a defendant has a right to an instruction that pinpoints the theory of the defense . . . .” ’ [Citation.] The court may, however, ‘properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence.’ ”

### 1.1 *The Substantive Law*

To establish possession of a firearm by a felon, the People must prove “conviction of a felony and ownership or knowing possession, custody, or control of a firearm.” (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029, disapproved on other grounds in *People v. Frierson* (2017) 4 Cal.5th 225, 240, fn. 8; see § 29800, subd. (a)(1).)

“A defendant possesses a weapon when it is under his dominion and control. [Citation.] A defendant has actual possession when the weapon is in his immediate possession or control. He has constructive possession when the weapon, while not in his actual possession, is nonetheless under his dominion and control, either directly or through others.” (*People v. Peña* (1999) 74 Cal.App.4th 1078, 1083-1084.) Thus, “more than one person may possess the same [weapon]. [Citation.] Possession may be imputed when the [weapon] is found in a place which is immediately accessible to the joint dominion and control of the accused and another.” (*People v. Miranda* (2011) 192 Cal.App.4th 398, 410 (*Miranda*).) “Implicitly, the crime is committed the instant the felon in any way has a firearm within his control.” (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1410, italics omitted.)

Constructive possession can be established by circumstantial evidence and reasonable inferences drawn from the defendant’s conduct. (*People v. Williams* (1971) 5 Cal.3d 211, 215.) The inference of dominion and control is easily made when the contraband is discovered in a place over which the defendant has general dominion and

control. (*Ibid.* [single pill on floor in front of seat where the defendant was sitting]; *Miranda, supra*, 192 Cal.App.4th at pp. 410-411 [circumstantial evidence shotgun jointly possessed by car occupants].) This includes his residence. (See, e.g., *People v. Bagley* (1955) 133 Cal.App.2d 481, 484-485.)

Nonetheless, section 29800 is not a strict liability offense; thus, the People must prove defendant had the general criminal intent to possess the weapon, as contrasted with possession through “misfortune or accident.” (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 922 (*Jeffers*) [referencing defense contained within § 26]; see *People v. Sargent* (1999) 19 Cal.4th 1206, 1215 [“General criminal intent . . . requires no further mental state beyond willing commission of the act proscribed by law”].) Pinpoint instructions pertaining to his type of defense are not warranted where there is no substantial evidence that could show that the defendant acted without the mental state necessary to commit the crime. (See *Burney, supra*, 47 Cal.4th at p. 246 [court may refuse pinpoint instruction not supported by substantial evidence]; *People v. Sullivan* (1989) 215 Cal.App.3d 1446, 1453 (*Sullivan*) [no error in refusing pinpoint instruction on momentary possession of contraband where facts do not support it].)

## 1.2 *The Instructions Given*

We limit our discussion to those instructions pertinent to defendant’s arguments on appeal. The trial court instructed the jury on its duty to decide the facts and follow the law as explained by the court regardless of any conflicting attorney arguments. (See CALCRIM No. 200.) (1 CT 135; RT 181-182) The court further instructed that “[t]he crime charged in this case requires proof of the union, or joint operation, of act and wrongful intent. [¶] For you to find a person guilty of the crime of violating [section] 29800[, subdivision] (a)(1) of the Penal Code, possession of a firearm by a person having previously been convicted of a felony, as charged in Count 1, that person must not only commit the prohibited act, but must do so with wrongful intent. A person acts with

wrongful intent when he intentionally does a prohibited act; however, it is not required that he intend to break the law. The act required is explained in the instruction for that crime.” (See CALCRIM No. 250.)

“The defendant is charged in Count 1 with unlawfully possessing a firearm in violation of Penal Code section 29800[, subdivision] (a)(1). [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] (1) The defendant possessed a firearm; [¶] (2) The defendant knew that he possessed the firearm; [¶] AND [¶] (3) The defendant had previously been convicted of a felony. [¶] . . . [¶] Two or more people may possess something at the same time. [¶] A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it, either personally or through another person. [¶] The defendant and the People have stipulated, or agreed, that the defendant was previously convicted of a felony. This stipulation means that you must accept this fact as proved.” (See CALCRIM No. 2511.)

### 1.3 *The Requested Instructions*

Defendant proposed three different pinpoint instructions, all of which were rejected by the trial court because the authorities proffered for the instructions were distinguishable, the form instructions adequately addressed constructive possession, and the requested instructions could confuse the jury.

These were:

(1) “Possession requires a showing that defendant exercised dominion and control over the weapon with knowledge of its presence and nature. Proof of opportunity to access to a place where a firearm is found, without more, will not support a finding of unlawful possession.”



(2) “Knowledge does not conclusively demonstrate intent to exercise dominion and control.”

(3) “Possession may be shared with others. However, mere proximity to a weapon, standing alone, is not sufficient evidence of possession, even if the person knows that a weapon is in the room. Something being in a person’s room is not conclusive evidence of possession.”

#### 1.4 *Application*

Here, the trial court properly instructed the jury with CALCRIM Nos. 250 and 2511. Thus, the jury was instructed on the required union of general criminal intent and the prohibited act, specifically, that defendant had to knowingly and intentionally possess the rifle. (See CALCRIM Nos. 250, 2511.) Defendant nonetheless argues the trial court erred in failing to give his requested pinpoint instructions because the jury could have found defendant guilty without necessarily determining that he possessed the rifle with wrongful intent.

We disagree. The requested pinpoint instructions were not warranted by the facts, were unnecessary because the pattern instructions adequately instructed on constructive possession, were in some instances inaccurate (e.g., the second requested instruction imported a specific intent requirement), and had the risk of confusing the jury. (*Burney*, *supra*, 47 Cal.4th at p. 246.)

We also find defendant’s reliance on *People v. Sifuentes* (2011) 195 Cal.App.4th 1410 (*Sifuentes*), disapproved on another ground in *People v. Farwell* (2018) 5 Cal.5th 295, 304, fn. 6, is misplaced, as that case is factually distinguishable<sup>3</sup> and analyzes the

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<sup>3</sup> Specifically, there was no evidence that the *Sifuentes* defendant knew of the gun hidden under another gang member’s mattress in the hotel room rented at an unknown time by Sifuentes, and the expert testimony offered regarding the sharing of “gang guns” on the issue of right to control was equivocal. (*Sifuentes*, *supra*, 195 Cal.App.4th at

sufficiency of the evidence presented, not the instructions given. Further, unlike the defendant in *Jeffers*, *supra*, 41 Cal.App.4th 917, who was deprived of a jury instruction requiring the jury to find that he intentionally possessed the gun that was in a package he allegedly delivered for another person without knowing the contents (*id.* at pp. 919-920, 924), here, the trial court did instruct the jury on the required union of the prohibited act and general criminal intent. (See CALCRIM No. 250.)<sup>4</sup> (See *People v. Padilla* (2002) 98 Cal.App.4th 127, 135 (*Padilla*) [distinguishing *Jeffers* because the court properly gave the general intent instruction found in CALJIC No. 3.30].)

Moreover, there was no substantial evidence in the record from which the jury could have determined that defendant possessed the rifle but did not have the required general criminal intent; for example, that he accidentally possessed the firearm, further distinguishing the *Jeffers* case. (*Jeffers*, *supra*, 41 Cal.App.4th at pp. 924-925.) Here, defendant knew there was a firearm in his room, as demonstrated by his request to be handcuffed and statement to Officer Decena that there was a *rifle* in his room. Officer Decena then located the loaded rifle in defendant's bedroom in an open duffle bag that was partially obstructing the doorway. There was simply no evidence from which the jury could have determined that although defendant knew the rifle was in his bedroom in an open bag on the floor, defendant did not have the general criminal intent to possess it because of accident, misfortune, or another circumstance necessitating a pinpoint instruction. (See *Sullivan*, *supra*, 215 Cal.App.3d at p. 1453; *People v. Pepper* (1996)

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pp. 1413, 1417-1419.) Here, in contrast, the evidence established defendant knew the rifle was in *his* bedroom and was found in an open bag on the floor of that room.

<sup>4</sup> While *Jeffers* dealt with the failure to give CALJIC No. 3.30 (*Jeffers*, *supra*, 41 Cal.App.4th at p. 920), it is still instructive here. CALCRIM No. 250 is materially the same, instructing the jurors that it is unnecessary that defendant intend to act illegally, but that it is required that he intend to do the prohibited act. (Compare CALJIC No. 3.30 with CALCRIM No. 250.)

41 Cal.App.4th 1029, 1038 [because the law prohibits “a convicted felon from possessing a firearm even momentarily except in self-defense, in defense of others, or as a result of legal necessity,” defendant was not entitled to pinpoint instruction on transitory possession of the gun]; see *Padilla, supra*, 98 Cal.App.4th at pp. 135-137 [trial counsel not ineffective for failing to request pinpoint instruction that the defendant, who allegedly was handed a gun in a car to hide it from authorities, had no intent to possess it].)

### **DISPOSITION**

The judgment is affirmed.

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s/BUTZ, Acting P. J.

We concur:

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s/DUARTE, J.

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s/RENNER, J.